

MARTHA D. TAYLOR  
(On Reconsideration)

IBLA 72-196

Decided October 21, 1974

Appeal from BLM decisions rejecting Alaska Native allotment applications AA 6493 and dismissing contest complaint AA 597-A.

Affirmed.

1. Alaska: Native Allotments

Withdrawn lands and lands embraced in a valid State selection are not subject to appropriation under the Native Allotment Act.

APPEARANCES: Alaska Legal Services Corporation, for appellant; Cole, Hartig, Rhodes & Norman, Esqs., for Kodiak Island Borough.

OPINION BY ADMINISTRATIVE JUDGE RITVO

By separate decisions on October 26, 1971, the Anchorage Office, Bureau of Land Management, rejected appellant's Alaska Native allotment application filed pursuant to 43 U.S.C. § 270-1 (1970), and dismissed a contest complaint against Kodiak Island Borough. The application was rejected and the complaint dismissed because the lands were not public lands available to private appropriation in 1966 and 1967 when settlement was attempted.

The land involved was withdrawn for use by the Navy by Executive Order 8278 of October 28, 1939. The withdrawal remained in effect until revoked in part by Public Land Order 4119 of December 13, 1966. The opening order gave the State of Alaska a 90-day preference right of selection. In other words --the lands would remain closed to all except a state selection for a period of 90 days after December 13, 1966. The State of Alaska filed its selection application AA-597 on December 21, 1966; it covered the lands sought by appellant. The State selection was afforded tentative approval on March 29, 1967; the State conveyed the land to Kodiak Island Borough.

[1] Except for the different nearby tracts involved, the identical situation giving rise to this appeal was encountered and

discussed in Theodore A. Velanis, A-30953 (Mar. 7, 1969). The Department held that the land was closed to private appropriation (location) ever since the withdrawal of 1939 and that the purported location(s) during the State's preference right period could not serve to vest any rights in the locator. Again, in David Capjohn, 14 IBLA 330 (1974), this Board made clear that withdrawn lands are not open to private appropriation and that no allotment rights may be initiated on lands not otherwise open to appropriation. In Helen F. Smith, 15 IBLA 301 (1974), we reiterated, inter alia, that, pursuant to the pertinent regulation, 43 CFR 2627.4(b), the filing of a State selection segregates the land from subsequent private appropriation and that a location made after the selection has been made and posted is void ab initio. Thus, appellant could not initiate settlement or allotment rights in this land and has no interest therein which can sustain a contest or protest.

For the reasons outlined above, and pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decisions below are affirmed.

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Martin Ritvo  
Administrative Judge

I concur:

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Douglas E. Henriques  
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN, CONCURRING IN THE RESULT:

Although I have no problem with the decision as written, I believe an error in the decision below warrants discussion.

The decision of the BLM Alaska State Office, dated October 26, 1971, from which the appeal was taken, dismissed the contest complaint "since this office cannot entertain a contest against the Kodiak Island Borough and since the law and the regulations do not provide for contest of a State selection application \* \* \*."

The reference to the Kodiak Island Borough is premised upon the fact that the Borough had no pending application or entry affecting the lands in issue. However, I cannot agree that a State selection application is immune from contest proceedings. See Augusta G. Stanley, State of California, A-26959 (November 15, 1954); State of Utah v. Olson, 47 I.D. 58 (1919); Gauss et al. v. State of Montana, 45 I.D. 458 (1916); State of Oregon, Mallet v. Johnston, 14 I.D. 658 (1892); 13 I.D. 259 (1891); State of Oregon, 12 I.D. 64 (1891); State of Oregon, 5 I.D. 31 (1886); Ringsdorf v. The State of Iowa, 4 L.D. 497 (1886).

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Frederick Fishman  
Administrative Judge

